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No. 93-335

In the Supreme Court of the United States

OCTOBER TERM, 1993

JAMES G. LEDBETTER, COMMISSIONER,
GEORGIA DEPARTMENT OF HUMAN RESOURCES,
PETITIONER

v.

DONNA SHALALA, SECRETARY OF
HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 42 U.S.C. 3029(a), which provides that the Secretary of Health and Human Services may disburse Older Americans Act grants to the States "after necessary adjustments resulting from previously made overpayments or underpayments," authorizes the Secretary to deduct from future grants to a particular State those amounts that reflect previous overpayments of federal funds to that State.

2. Whether the Secretary's authority under Section 3029(a) to make "adjustments resulting from previously made overpayments" is limited to adjustments for overpayments made in the current fiscal year.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 986 F.2d 428. The opinion of the district court (Pet. App. 27a-48a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a-20a) was entered on March 17, 1993. A petition for rehearing was denied on June 3, 1993. Pet. App. 21a-22a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Older Americans Act of 1965, 42 U.S.C. 3001 *et seq.*, the federal government provides assistance to state and local governments for the funding of programs to assist the elderly. The Act is administered by the Administration on Aging (AOA) in the Department of Health and Human Services (HHS). Under Title III of the Act, grants are disbursed to state and local governments that have submitted plans approved by the Commissioner of the AOA. Pet. App. 2a-3a.

In early 1985, HHS conducted an audit of the State of Georgia's use of Title III funds during the fiscal years 1982-1983, 1983-1984, and 1984-1985. Several deficiencies were discovered regarding implementation of the State's plan. After a further review of the State's program, HHS determined that the State had incorrectly used $728,361 in federal funds for "nutrition administration," and had improperly qualified for an additional $404,457 in federal funds by using "in-kind" contributions to meet the state matching-fund requirements of the Act. Pet. App. 4a-6a.

On the basis of those findings, the State was notified in 1986 that it was required to repay $1.13 million in disallowed costs. Pet. App. 5a-6a. The State appealed to HHS's Departmental Grant Appeals Board, contending that HHS had misinterpreted its statutory and regulatory authority and that HHS was estopped from seeking to recover the disallowed funds. The Board rejected the State's contentions and upheld the disallowance in its entirety. Pet. App. 62a-80a. The Board also denied the State's request for reconsideration. *Id.* at 54a-61a.

2. The State then filed suit in the United States District Court for the Northern District of Georgia, seeking judicial review of the Board's decision and claiming that HHS lacked statutory authority to disallow federal

funds previously awarded to the State under the Act. Pet. App. 40a. The district court granted summary judgment for the State. *Id.* at 27a-48a.

The district court held that the Older Americans Act provides no authority for HHS to recover grant funds improperly used by a State. Pet. App. 43a, 47a. Instead, the court explained (*id.* at 42a-43a), the Act provides that when a State fails to comply with the requirements of the Act, no further federal payments will be made to the State until HHS "is satisfied that there will no longer be any failure to comply." 42 U.S.C. 3027(d). That prospective "non-compliance remedy" is, in the court's view, the Act's "only mechanism" for responding to a State's failure to comply with the statutory and regulatory requirements of the federal program. Pet. App. 43a.[1]

3. The court of appeals reversed and remanded for consideration of the merits of HHS's disallowance determination. Pet. App. 1a-18a. The court of appeals agreed (*id.* at 11a) with the district court's conclusion that 42 U.S.C. 3027(d) provides only a prospective non-compliance remedy for violations of the Act. The court concluded, however, that a separate provision of the Act, 42 U.S.C. 3029(a),[2] provides statutory authority for recovery of grant funds misspent by a State in the past. The court noted that this Court has construed similar statutory language to authorize recovery of misspent funds. Pet. App. 12a-14a (citing *Bell* v. *New Jersey*, 461

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[1] In entering judgment for the State on this ground, the district court noted that the parties had specifically "preserved their respective rights to litigate the merits of the underlying disallowance at issue in this case" if the court's ruling were reversed on appeal. Pet. App. 25a.

[2] Section 3029(a) provides that "[p]ayments of grants or contracts under [Title III of the Act] may be made (after necessary adjustments resulting from previously made overpayments or underpayments) in advance or by way of reimbursement."

U.S. 773, 780-784 (1983)). Accordingly, the court held that Section 3029(a) "gives [HHS] the right to recover from the state any amount of funds paid to the state that were not used in compliance with the applicable federal requirements." Pet. App. 14a.

The court of appeals rejected the State's argument that *Bell* was inapplicable in this case because the legislative history of the Act is silent with respect to the existence of a right to recover misspent funds. The court explained that the plain language of the Act is dispositive, and that *Bell* did not rest its holding on the existence of helpful legislative history. Pet. App. 14a-15a.

The court next rejected the State's contention that HHS was required to give the State notice and an opportunity to be heard under 42 U.S.C. 3027(c) before acting to disallow prior payments pursuant to Section 3029(a). The court reasoned that the notice-and-hearing requirements of Section 3027(c) apply only to the prospective remedy provided by Section 3027(d), and not to the disallowance remedy established by Section 3029(a). Pet. App. 15a-16a.

Finally, the court found unpersuasive the State's claim that Section 3029(a) applies only to inadvertent or accidental overpayments. The court explained that the text of Section 3029(a) contains no such limitation, and that in any event the erroneous disbursement of federal funds to the State was "accidental" in that HHS had relied on the State's assurances that it would comply with the requirements of the Act. Pet. App. 16a-17a.

ARGUMENT

1. Petitioner contends (Pet. 8-15) that the Older Americans Act does not authorize HHS to recover federal grant monies improperly disbursed to state and local government grant recipients under the Act. That con-

tention is incorrect, and does not warrant further review.

a. The Older Americans Act explicitly provides that, in paying grants to the States, HHS may make "necessary adjustments resulting from previously made overpayments." 42 U.S.C. 3029(a). Thus, the Act authorizes the Secretary to deduct from future grant payments any funds improperly received by the State in the past. Because the intent of Congress to authorize recovery of overpayments is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

Even if there were some ambiguity in Section 3029(a), moreover, the court of appeals' construction of that provision would be correct, because it is consistent with the statutory interpretation urged by the agency responsible for implementing the Act. HHS has long taken the position that it is authorized to make disallowances under the Act. See 46 Fed. Reg. 43,817, 43,821 (1981), codified at 45 C.F.R. Pt. 16, App. A, ¶ B(a)(4) (describing as within the jurisdiction of the Departmental Grant Appeals Board appeals from "[d]isallowances under Title III of the Older American[s] Act"). That position is plainly a reasonable one in light of the text of Section 3029(a), and thus HHS's interpretation of the statute is entitled to deference. *Chevron*, 467 U.S. at 843.

Similar statutory provisions in other federal grant programs have been construed to authorize federal agencies to recover improperly obtained or misspent funds. In *Bell* v. *New Jersey*, 461 U.S. 773 (1983), for example, this Court construed language in the pre-1978 version of the Elementary and Secondary Education Act of 1965 (ESEA) to create a statutory right to recover federal

ESEA grant funds misspent by state grant recipients. The relevant statutory language provided:

> [P]ayments [to a State] shall take into account the extent (if any) to which any previous payment to such State educational agency under this title (whether or not in the same fiscal year) was greater or less than the amount which should have been paid to it.

461 U.S. at 782 (quoting Section 207(a)(1) of the ESEA). In *Bell*, the States argued that the federal government's "sole remedy for noncompliance was prospective," *i.e.*, that the federal government could withhold funds until the States brought their programs into compliance, but could not recover grant funds previously spent by the States. 461 U.S. at 780-781. The Court rejected that argument, holding that the "plain language of the statute" contemplated that the federal government would have the right to recover federal funds misused by the States. *Id.* at 783.[3]

Similarly, in *Maryland Dep't of Human Resources* v. *HHS*, 763 F.2d 1441 (D.C. Cir. 1985), the court reached a similar result with respect to the pre-1981 provisions of Title XX of the Social Security Act. Title XX directed HHS to make estimated quarterly funding payments to the States, 42 U.S.C. 1397a(b)(1) (1976), and further specified that payments of the estimated amounts would include adjustments for prior payments over or under the appropriate amounts:

> The Secretary shall then pay to the State, in such installments as he may determine, the amount so

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[3] Petitioner errs in asserting (Pet. 12) that *Bell* "may have lost some of its vitality" in light of subsequent decisions of this Court. None of the cases cited by petitioner questions the analysis applied by this Court in *Bell* or suggests that the result in that case would be different now.

> estimated, *reduced or increased to the extent of any overpayment or underpayment* which the Secretary determines was made under this section to the State for any prior quarter and with respect to which adjustment has not already been made under this subsection.

42 U.S.C. 1397a(b)(2) (1976) (emphasis added). The court construed that provision to create a "statutory right of recovery" of the State's "debt to the federal government" for misused funds. 763 F.2d at 1457.

Petitioner points to no contrary authority.[4] Thus, there is no circuit conflict on this question, and the decision of the court of appeals is consistent with both the plain language of Section 3029(a) and the case law construing similar statutory provisions. Further review is not warranted.

b. Even if the Act did not expressly authorize HHS to recover federal funds improperly obtained or misspent, the judgment of the court of appeals in this case would be correct, because the federal government possesses a common law right to recover such funds. Although the

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[4] Petitioner errs in contending (Pet. 14) that the decision below "conflicts in principle" with *Community & Economic Development Ass'n* v. *Suburban Cook County Area Agency on Aging*, 770 F.2d 662 (7th Cir. 1985). In that case, the court refused to find an implied private right of action under Section 501(b) of the Comprehensive Older Americans Act Amendments of 1978 that would have permitted service providers to sue States or localities in federal court for alleged violations of the Act. The court explained that it had "found no indication of an intent on the part of Congress to provide an implied private right of action to existing service providers." 770 F.2d at 668. In this case, by contrast, the court of appeals concluded that the language of Section 3029(a) demonstrates congressional intent to authorize recoupment of federal funds misspent by the States. There is plainly no conflict "in principle" between those two decisions.

court of appeals did not find it necessary to reach that issue (Pet. App. 17a n.6), other courts have recognized that the federal government has a common law right to recover, by setoff or recoupment, federal funds that have been improperly or illegally disbursed. See *United States* v. *Wurts*, 303 U.S. 414, 415 (1938); *Mount Sinai Hospital of Greater Miami, Inc.* v. *Weinberger*, 517 F.2d 329, 337, modified on other grounds, 522 F.2d 179 (5th Cir. 1975) (per curiam), cert. denied, 425 U.S. 935 (1976); *Georgia Dep't of Human Resources* v. *Califano*, 446 F. Supp. 404, 412 (N.D. Ga. 1977). Nothing in the Act suggests an intention to eliminate that common law right, and thus it must be deemed to have survived adoption of the Act. *United States* v. *Texas*, 113 S. Ct. 1631, 1634 (1993).

2. Petitioner contends (Pet. 15-21) that even if Section 3029(a) authorizes the recoupment of misused federal funds, the scope of that recoupment remedy should be limited to funds disbursed in the current fiscal year. The court of appeals did not decide that issue, because it was raised for the first time in the State's petition for rehearing and suggestion of rehearing en banc. This Court does not ordinarily decide questions not decided by the court of appeals. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697-698 (1984); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam).

In any event, petitioner's contention is without merit. Nothing in Section 3029(a) can be read to limit adjustments for overpayments to the current fiscal year. To the contrary, the statute expressly authorizes adjustments for "previously made overpayments," a phrase that is plainly retrospective in nature and that does not purport to limit HHS's discretion in deciding the extent to which overpayments made in past fiscal years should be recaptured. Petitioner points to nothing in the text

or legislative history of the statute that supports his narrower reading.

Petitioner also errs in contending (Pet. 18-20) that HHS's construction of Section 3029(a) runs afoul of the rule that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen* v. *Georgetown University Hosp.*, 488 U.S. 204, 208 (1988). In contrast to the situation in *Bowen* and the other cases relied upon by petitioner, in this case HHS is not seeking to apply a new rule retroactively in order to change preexisting substantive rights or obligations; rather, HHS is seeking merely to recover funds disbursed to the State in violation of statutory and regulatory requirements that were in existence at the time the disbursements were made. Moreover, by authorizing adjustments for "previously made overpayments," Congress made clear that HHS possesses the power to reexamine past payments to the States and take account of any errors in those payments. *Bowen* requires no more.

Petitioner's reliance (Pet. 17) on *Good Samaritan Hosp.* v. *Shalala*, 113 S. Ct. 2151 (1993), is similarly misplaced. That case did not concern the proper interpretation of the Older Americans Act, and it did not involve any question of the federal government's authority to recover federal funds misused by, or improperly disbursed to, federal grant recipients in prior years. Thus, HHS had no occasion to address the question whether the statutory provisions at issue in that case authorized it to recover funds improperly disbursed under the Medicare program in prior years, and the case sheds no light on that question.

3. Review of the court of appeals' decision would be particularly inappropriate at this time, because the court of appeals remanded the case for further proceedings in

the district court. On remand, petitioner will be given the opportunity to challenge the merits of HHS's disallowance order; a ruling for petitioner on that ground would obviate any need for further appellate review of the questions petitioner seeks to raise in this Court. Under these circumstances, petitioner's claims are "not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen* v. *Bangor & A.R.R.*, 389 U.S. 327, 328 (1967) (per curiam); see also R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 224 (6th ed. 1986).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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